APPENDIX

MEMORANDUM AND ORDER

(SAME TITLE)

Appearances:

Hervey & Legum, Esqs., 16 Court Street,
Brooklyn, New York 11241
by Aaron Nussbaum, Esq., for plaintiff

Maurice H. Nadjari, Esq., Deputy Attorney General,
Special Prosecutor, 2 World Trade Center,
New York, New York 10047
by Melvin M. Dildine, Esq.,
Special Assistant Attorney General,
for defendant

This is an action to convene a three-judge court, pursuant to 28 U.S.C. §§ 2281 and 2284, seeking the following relief: (1) a declaratory judgment that the state prosecution of plaintiff is being carried out in an unconstitutional manner; and (2) an injunction barring the defendant and his agents from continuing the prosecution. Plaintiff was indicted on December 18, 1973 by the Extraordinary and Special Grand Jury for the County of Kings for the crimes of conspiracy in the third degree, attempted bribery in the second degree, and grand larceny in the second degree. He had been arrested September 25, 1973 after an investigation started by the office of the United States Attorney for the Southern District of New York and completed by defendant's office after the decision in *United States v. Archer*, 486 F. 2d 670 (2d Cir. 1973).

On January 25, 1974 the Honorable J. Irwin Shapiro, Associate Justice of the Appellate Division of the Supreme Court, Second Judicial Department, granted an order authorizing the plaintiff herein to bring certain pretrial motions before a term of the Appellate Division. Those motions, briefly summarized, requested dismissal of the pending indictment on the ground that the defendant herein, the Special Deputy Attorney General, had abused his powers with regard to the investigation and prosecution of this criminal matter; disqualification of the Honorable John M. Murtagh, presiding Justice of the Extraordinary Special and Trial Term; disqualification of Maurice H. Nadjari, the defendant herein, from conducting the prosecution; discovery; and an order impounding tapes of electronic recordings made during the course of the investigation of the plaintiff. On May 20, 1974 the Appellate Division denied all but the plaintiff's discovery motions. In adopting the concurring opinion of Justice Shapiro in *Klein v. Murtagh*, 44 App. Div. 2d 465, 355 N.Y.S.2d 622, 630 (2d Dep't 1974), the Appellate Division indicated its view that the questions raised should be decided at the trial level.

Plaintiff's allegations in the case at bar are similar to those raised before the Appellate Division. He asserts that he was unfairly "entrapped" into committing the acts which led to his indictment. Further, plaintiff claims that the prosecutors have engaged in gross misconduct in that they threatened plaintiff with the indictment before he finally was indicted and attempted to coerce him into "cooperating" with the prosecution by "setting up" Justices of the Supreme Court, Kings County and other public officials, *i.e.*, involve them in crimes similar to those he is charged with. In an affidavit in support of the motion plaintiff specifies his allegations of misconduct on the part

of defendant's agents. The defendant strenuously denies these factual allegations. The court makes no findings with respect to plaintiff's charges of prosecutorial misconduct. It does, however, share the concern of Judge Friendly in *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973) and Justice Shapiro in *Klein v. Murtagh*, 44 App. Div. 2d 465, 355 N.Y.S. 2d 622, 630 (2d Dep't 1974) (concurring opinion), that investigatory methods should not undermine the integrity of the judicial process.

Defendant opposes plaintiff's motion on the authority of *Younger v. Harris*, 401 U.S. 37 (1971) and *Samuels v. Mackell*, 401 U.S. 66 (1971). However, a three-judge court must be convened in order to dismiss on *Younger-Samuels* principles, *i.e.*, whereas the requisite bad faith enforcement or other special circumstances exist. *Steffel v. Thompson*, 42 U.S.L.W. 4357, 4359, n. 7 (March 19, 1974); *Abele v. Markle*, 452 F.2d 1121 (2d Cir. 1971).

A district court faced with an application for a three-judge court is limited to determining (1) whether the constitutional question is substantial; (2) whether the complaint at least formally alleges a basis for equitable relief, and (3) whether the case otherwise comes within the requirements of the three-judge statute. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962) (per curiam). The statute is to be narrowly construed. *Phillips v. United States*, 312 U.S. 246 (1941). Without deciding whether the first two requirements have been met, the court questions whether the three-judge statute is intended to apply to this type of case. Plaintiff argues that the statute, Executive Law § 63 (McKinney 1951) and Executive Order No. 55, under which the office of the Special Deputy Attorney General was set up, are unconstitutional *as applied* to him because agents of the Special Deputy Attorney General allegedly acted im-

properly by depriving him of his constitutional rights. Accepting the allegations as true for the purposes of this motion, *Goosby v. Osser*, 409 U.S. 512, 521, n. 7 (1973); *Nieves v. Oswald*, 477 F.2d 1109, 1112 (2d Cir. 1973), the real issue presented here is not whether the statute is unconstitutional, even as applied to the plaintiff, but rather whether acts committed by state officers appointed under the authority of a statute deprive the plaintiff of due process and warrant federal intervention under the three-judge court statute. This court must pass upon the authority of federal courts to intervene in state criminal prosecutions. When what in substance being challenged is neither a statute, nor the policy underlying the statute, but rather the activities of a state officer appointed under the authority of the statute, resort to a three-judge court is inappropriate. *Phillips v. United States*, 312 U.S. 246 (1941); *Ex Parte Bransford*, 310 U.S. 354 (1940); *Galvan v. Levine*, 490 F.2d 1255, 1258 (2d Cir. 1973). The statute and executive order under which the Special Deputy Attorney General was appointed and operates cannot be construed to authorize the alleged wrongful activities. Therefore, the policy of the three-judge court statute — to protect state statutory policy from being overturned by a single federal judge — would not be served by convening such a court here. Congress did not intend for federal courts to interfere with the execution of state statutes except where a showing is made that the statute is unconstitutional on its face or as applied; it recognized that adequate remedies exist within the states for solving problems of the type presented here. Since plaintiff has failed to fulfill the strict requirements for convening a three-judge court, his application must be denied.

The Rule 12(b)(6) motion pending, which must hereafter

be treated as a Rule 56 motion for summary judgment, is not decided. The court, however, will entertain a motion to dismiss the complaint.

s/Costantino
U.S.D.J.

MEMORANDUM AND ORDER DATED DECEMBER 6, 1974

(SAME TITLE)

Appearances:

Hervey & Legum, Esqs.,
16 Court Street, Brooklyn, New York 11241
by Aaron Nussbaum, Esq., for plaintiff

Maurice H. Nadjari, Esq.,
Deputy Attorney General, Special Prosecutor,
2 World Trade Center, New York, N.Y. 10047
by Melvin M. Dildine, Esq., Special Assistant
Attorney General, for defendant

By Memorandum and Order dated August 8, 1974 this court denied plaintiff's motion to convene a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284. Still pending is plaintiff's suit for a declaratory judgment that the state indictment of the plaintiff is "null and void under the Due Process Clauses of the Fifth and Fourteenth Amendments of the Constitution," his application for a preliminary and permanent injunction prohibiting the defendant from continuing with the prosecution of plaintiff in the state courts, and defendant's cross motion to dismiss for failure to state a claim for which relief can be granted, Rule 12(b)(6), Fed. R. Civ. P. This case presents a delicate question involving federal-state comity and requires examination of the rules enunciated by the Supreme Court in *Younger v. Harris,* 401 U.S. 37 (1971); *Samuels v. Mackell,* 401 U.S. 66 (1971), and later cases.

The essential facts were outlined in the August 8, 1974 memorandum. All that need be restated is that plaintiff alleges an abuse of discretion on the part of defendant in the investigation and prosecution of plaintiff. He contends that this case presents the "extraordinary circumstances" and "bad faith and harassment" that the Supreme Court in *Younger v. Harris*, supra, referred to as justifying the intervention of a federal court in a pending state prosecution. Defendant denies plaintiff's allegations and argues that plaintiff will have a full opportunity in the course of the state prosecution to assert any defenses and objections to the actions of the prosecutor, thereby rendering resort to this court unnecessary and inappropriate.

A brief summary of the applicable standards serves to aid an analysis of the allegations herein. Chief Justice Burger recently stated in a concurring opinion in *Allee v. Medrano*, ———U.S.———, 94 Sup. Ct. 2191, 2210 (1974);

> To meet the *Younger* test the federal plaintiff must show manifest bad faith and injury that is great, immediate, and irreparable, constituting harassment of the plaintiff in the exercise of his constitutional rights, and resulting in a deprivation of meaningful access to the state courts. The federal plaintiff must prove bad faith and requisite injury.

It is clear, then, that the *Younger* standard is an extremely strict one. This reflects the reluctance of federal courts to interfere with pending state prosecutions. The Supreme Court has not stated with specificity the type of activities which would justify a federal court in enjoining a state prosecution. In *Dombrowski v. Pfister*, 380 U.S. 479 (1965), a pre-*Younger* decision, and the only recent case in

which the Court has held allegations sufficient to justify federal relief, the plaintiff alleged that a state prosecutor was holding public hearings and disseminating evidence which had already been ordered suppressed by a state court. The Court held that the facts alleged justified interference because the conduct of the prosecutor "chilled" plaintiff's First Amendment right to free speech and a subsequent state trial under those circumstances would not assure vindication of that right. Since *Younger* was decided, however, no set of facts has been found by the Supreme Court to justify intervention by means of an injunction of the state prosecution.

The alternative of granting declaratory relief was discussed by the Supreme Court in *Samuels v. Mackell*, 401 U.S. 66 (1971), a companion decision of *Younger*. There it was stated that in the context of a pending state prosecution a declaratory judgment would have "virtually the same practical impact as a formal injunction would." 401 U.S. at 72. The Court went on to hold that the standards for granting declaratory relief should be the same as for granting injunctive relief. There was an exception to this rule:

> There may be unusual circumstances in which an injunction might be withheld because, despite a plaintiff's strong claim for relief under the established standards, the injunctive remedy seemed particularly intrusive or offensive; in such a situation, a declaratory judgment might be appropriate and might not be contrary to the basic equitable doctrines governing the availability of relief.

Samuels v. Mackell, 401 U.S. at 73.

A recent Third Circuit decision found that under the special facts in that case declaratory relief was called for

where enjoining a pending state prosecution was inappropriate, *Helfant v. Kugler*, 500 F.2d 1188 (3d Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3129 (U.S. August 6, 1974) (No. 74-80); cross-petition for cert. filed, 43 U.S.L.W. 3285 (U.S. August 13, 1974) (No. 74-277). The case involved the question of whether a former municipal court judge could get a fair trial where his admissions made before a grand jury may have been compelled by prior testimony given to New Jersey State Supreme Court Justices acting in their administrative capacity. The Third Circuit held that under the circumstances of the case before it, federal intervention would have a limited impact on the state prosecution. The district court was authorized to hold a hearing to determine whether the grand jury testimony was coerced and to issue a declaratory judgment if coercion were found. The court was "persuaded that any precedential value to our holding is miniscule." 500 F. 2d at 1198. This decision was reached over the strong dissent of Judge Adams in which Judges Van Dusen and Weis joined. They argued that both the policy against federal intrusion into state prosecutions and the constitutional right to a fair adjudication of guilt or innocence would be served by awaiting final disposition of the state procedures before resorting to federal courts for relief. The dissent reiterated the fear expressed in *Samuels* that declaratory relief has virtually the same impact as an injunction. The decision, both majority opinion and dissent, contains excellent commentary upon the state of the law in this difficult area.

Assuming the truth of the facts alleged by plaintiff for the purposes of this motion, it must be determined whether these facts warrant federal intrusion in light of the strong policy against it. It is clear from a reading of *Younger*, *Samuels*, and their progeny that traditional equitable

principles are to be applied in deciding whether a federal court ought to interfere with pending state prosecutions either by way of an injunction or a declaratory judgment. This involves examining the severity of the prejudice to plaintiff if the prosecution is allowed to continue as well as scrutinizing the conduct complained of. Plaintiff affirms that the expense of defending himself in the state action has forced him to go deeply into debt. The Court in *Younger*, however, made it clear that the cost, anxiety, and inconvenience of defending against a prosecution cannot "by themselves be considered 'irreparable' in the special legal sense of that term." 401 U.S. at 46. No allegation of harm comparable to that which the plaintiff suffered in *Dombrowski v. Pfister*, 380 U.S. 479 (1965) has been made.

Relying on *United States v. Archer*, 486 F.2d 670, 474-75 (2d Cir. 1973) and *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), plaintiff contends that defendant's conduct is violative of his due process rights. This court reiterates its comment in its August 8, 1974 memorandum that investigatory methods should never undermine the integrity of the judicial process. *See also Rochin v. California*, 342 U.S. 165 (1952) and *United States v. Russell*, 411 U.S. 423, 431 (1973). It should be noted, however, that *Archer* and *Toscanino* were not decided in the context presented here, *i.e.*, where a federal court is asked to interfere with a pending state prosecution. Plaintiff has a forum where he can assert these due process violations. If for some reason the state courts fail to protect his constitutional rights, resort may be had to federal relief under the habeas corpus statute, 28 U.S.C. § 2254.

Reviewing the facts as alleged in conjunction with plaintiff's claim of prejudice this court holds that to interfere with the ongoing state prosecution even by way of

holding a hearing looking towards a possible declaratory judgment would be unwise and in contravention of *Younger-Samuels* principles. The rule as expounded by the Supreme Court does not authorize federal interference where defenses and allegations of prosecutorial misconduct can be raised at the state proceeding and no prejudice other than the "cost, auxiety, and inconvenience" of defending against that prosecution is shown.

Accordingly, plaintiff's request for declaratory and injunctive relief is denied and defendant's motion to dismiss the complaint for failure to state a claim upon which relief can be granted is granted. The Clerk of the court is directed to prepare an order dismissing the complaint.

s/Costantino
U.S.D.J.

AMENDED MEMORANDUM AND ORDER

(SAME TITLE)

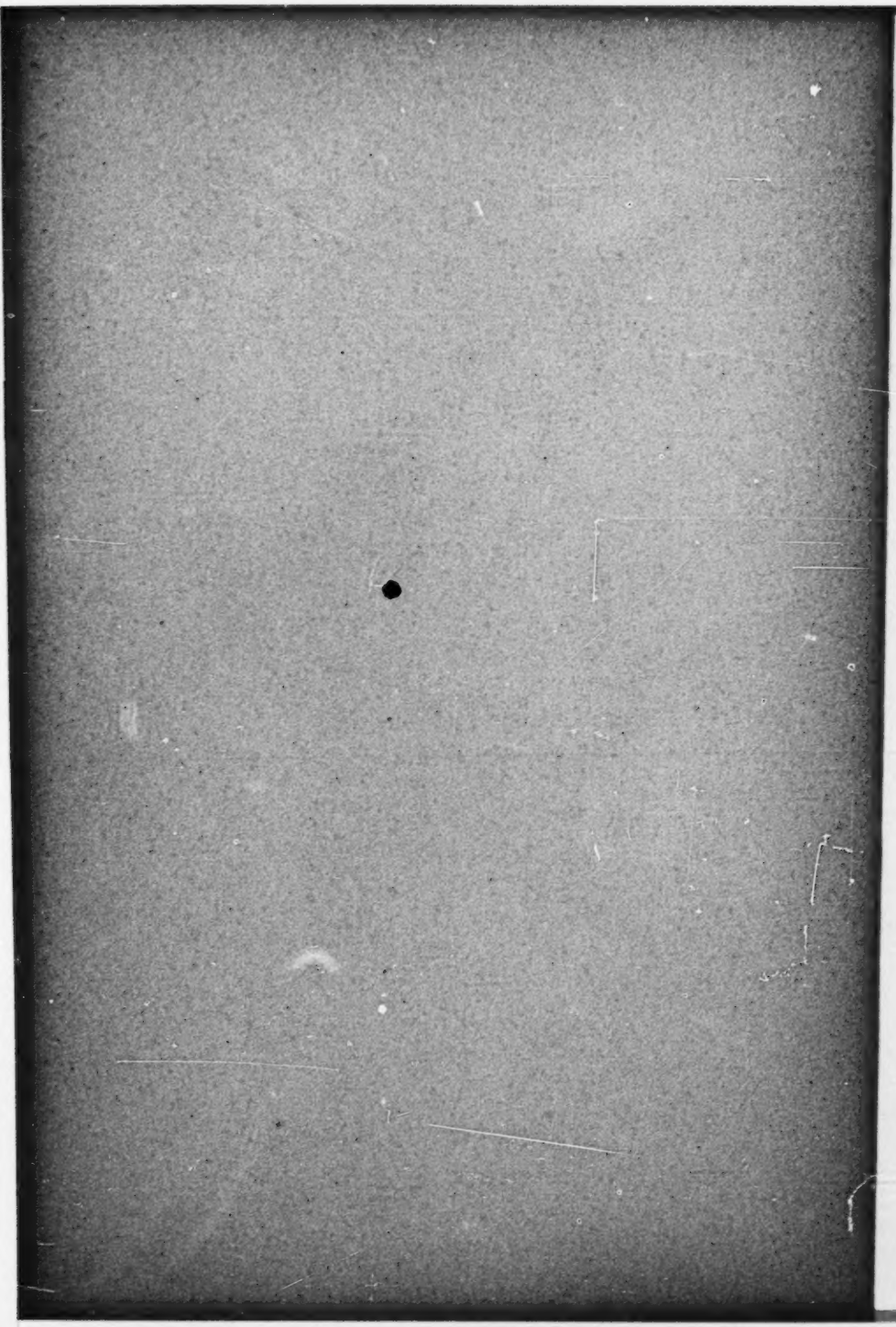
COSTANTINO, D.J.

The concluding paragraph on page 9 of the Memorandum and Order filed December 6, 1974 is amended to read as follows:

Accordingly, plaintiff's request for declaratory and injunctive relief is denied and defendant's motion to dismiss the complaint for failure to state a claim upon which relief can be granted is granted. The Clerk of the court is directed to prepare *a judgment* dismissing the complaint.

So Ordered.

s/Costantino
U.S.D.J.



MAY 20
MICHAEL ROSAK, J

IN THE

Supreme Court of the United States

October Term 1974

No. 74-1425

WILLIAM STEINMAN,

Petitioner,

v.

MAURICE H. NADJARI, individually and as Special Deputy Attorney General of the State of New York,

Respondent.

Supplemental Appendix

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ORDER AND JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of April one thousand nine hundred and seventy-five.

Present: HON. IRVING R. KAUFMAN, Chief Judge; HON. J. JOSEPH SMITH, HON. WILLIAM H. TIMBERS, Circuit Judges.

William Steinman,

Plaintiff-Appellant

v.

Maurice H. Nadjari, individually and as Special Deputy Attorney General of the State of New York,

Defendant-Appellee

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO, Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk

A true copy,
s/A. Daniel Fusaro, Clerk

STATEMENT MADE BY THE COURT AT DISPOSITION OF APPEAL IN OPEN COURT

[The following statement does not constitute a formal opinion of the Court and is not to be reported. It should not be recited or otherwise used in unrelated cases.]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Title

Docket No. 75-7025

Before: HON. IRVING R. KAUFMAN, *Chief Judge*, SMITH and TIMBERS, *Circuit Judges*.

New York, N.Y.
April 14, 1975

Statement made by the Court at disposition of appeal in open court.

CHIEF JUDGE KAUFMAN:

It should come as no surprise that we are familiar with this area of law and, of course, familiar with the case. We affirm the district court's judgment in all respects. We see no reason why the State courts cannot fairly and fully consider Steinman's claims. The requisite showing of "bad faith" is lacking, *see, e.g., Perez v. Ledesma*, 401 U.S. 88, 95 (1971) and it is well established that the need to defend against a State criminal prosecution is not the irreparable injury which is a prerequisite to Federal intervention. *See, e.g., Younger v. Harris*, 401 U.S.

37, 46 (1971), and *Douglas v. City of Jeannette*, 319 U.S. 157, 164 (1943). Nor do we believe that the Governor's power to appoint and remove an Extraordinary Term judge or the requirement that motions to the Appellate Division can be made only by permission violate due process. *A fortiori*, they are not "extraordinary circumstances" that allow a litigant to come into the federal court in the first instance. In sum, this is a classic case for restraint in invoking federal equitable relief, out of respect for State processes. The New York courts are fully capable of protecting against alleged constitutional violations, as the recent reversal of former District Attorney Mackell's conviction demonstrates.

You also raise the point about the convocation of a three-judge court. We believe that was properly denied, for the claims relating to the constitutionality of the State statutes are frivolous.

Accordingly, we affirm the judgment of the lower court.